

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FILED
07 APR -07 PM 1:36

FOURTH JUDICIAL DISTRICT

State of Minnesota,

HENNEPIN DISTRICT
COURT ADMINISTRATOR

Plaintiff,

ORDER
AND MEMORANDUM

vs.

Court File Number: 02098794
County Atty File Number: 02-6981

Myon Demarlo Burrell,

Defendant.

The above-entitled matter came on before Chief Judge Lucy A. Wieland on April 2, 2007 at C-655, Hennepin County Government Center, Minneapolis, Minnesota on the State's motions.

APPEARANCES:

Michael Freeman, County Attorney, appeared on behalf of the State.

Tracy Eichhorn-Hicks, Esq., appeared on behalf of the Defendant, Myon Demarlo Burrell, who was present.

ORDER:

1.) Having reviewed the record and having heard the arguments of counsel, the State's motions are denied.

Date: 4-3-07

BY THE COURT



Lucy A. Wieland

MEMORANDUM

This case has had a long and difficult history. In 2002, Tyesha Edwards was shot and killed by a stray bullet fired in a gang feud. This senseless murder devastated Tyesha Edward's family and shocked the community. As we approach the retrial of the man accused of the shooting, this court is committed to a just result: this case will be tried fairly and impartially.

HISTORY

On May 6, 2003, defendant Myon Burrell was convicted of Murder in the First Degree and Attempted Murder in the First Degree as well as Murder in the First Degree and Attempted Murder in the First Degree for the Benefit of a Gang. On May 19, 2005, the conviction was reversed by the Minnesota Supreme Court and remanded for a new trial. State vs. Burrell, 697 NW2d579 (Minn.2005) On July 21, 2005, the case was assigned to Judge Charles Porter for retrial. For the last year and a half, the state and defense have litigated a variety of pretrial motions regarding the admissibility of expert gang testimony based on the Supreme Court's opinion in Burrell which stated: "Accordingly, on remand we direct the court to weigh our directives in DeShay and Lopez-Rios carefully as it exercises discretion over what expert gang testimony is admitted." 1d at 602.

The use of expert gang testimony has been highly controversial. In an effort to prove that a crime has been committed for the benefit of a gang, the state has often relied on the testimony of police officers from the Gang Strike Force, offering their testimony as expert witnesses. The Minnesota Supreme Court has often been skeptical of this testimony and has frequently found the evidence to be improper. In State v DeShay, 669

NW2nd 878,886 (Minn. 2003), the Court stated: “The state should not be permitted to launder inadmissible hearsay evidence by the simple expedient of passing it through the conduit of purportedly ‘expert opinion’.” The task of determining what police testimony is permissible is difficult, and Judge Porter made a series of rulings on the use of expert gang testimony in this case. The state was unhappy with the rulings and, as a result, Judge Porter took the very unusual step of asking the Court of Appeals to answer four questions regarding his rulings on this testimony.

After the Court of Appeals and the Supreme Court refused to answer the certified questions, the parties met with Judge Porter on January 16, 2007 to set a trial date. At this point the state substituted attorneys, and for the first time, Mike Furnstahl appeared for the state. On March 26, 2007, the scheduled trial date, defendant waived a jury trial and Judge Porter accepted the waiver.

The State now brings three motions before this court:

- 1.) to remove Judge Porter for cause pursuant to Minn.R.Crim.Procedure R.26.03 subd.13;
- 2.) to rule that Judge Porter’s approval of the jury waiver was an abuse of discretion; or
- 3.) to direct that a waiver of jury trial must be with the “consent of the prosecutor.”

JURY TRIAL WAIVER

A jury trial may be waived by a defendant pursuant to Rules of Criminal Procedure, Rule 26.01, subd.1 (2), which provides: “The defendant, with the approval of the court may waive jury trial on the issue of guilt...” The Minnesota Rules of Criminal

Procedure do not require that the prosecutor consent to the waiver. These rules are controlling and, therefore, this request by the State must be denied.

The State has also requested that this court find Judge Porter's approval of the jury trial waiver an abuse of discretion. However, the Chief Judge does not sit as an appellate judge; a decision about a trial judge's abuse of discretion is properly raised before the appellate courts.

REMOVAL FOR CAUSE

Minnesota Rules of Criminal Procedure Rule 26.03, subd. 13 provides that no judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct, and that a request to disqualify a judge for cause shall be heard and determined by the Chief Judge of the judicial district.

The State argues that Judge Porter must be removed pursuant to Minn.R.Crim.Procedures 26.03, subd.13 based on the Minnesota Code of Judicial Conduct, Canon 3D(1) which states: a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer."

The State argues that Judge Porter's statements to counsel indicate that he has prejudged the case, and his impartiality might reasonably be questioned.

The defense argues that Judge Porter's statements related to the gang testimony issue, and that this motion is an attempt at judgeshopping in the hope of getting a more favorable ruling on gang testimony from a different judge.

The Supreme Court in State v. Dorsey, 701 N.W.2d 238(Minn.2005), noted that there is no precise formula for making a disqualification determination, and there is considerable room for interpretation in any given case. It is necessary, however, to make an objective examination of whether the judge's impartiality can reasonably be questioned, and it's presumed that judges will approach cases neutrally and objectively. Id at 248-49.

Mr. Furnstahl has submitted an affidavit stating that on January 16, 2007, Judge Porter told him the State should dismiss the case as it could not be proved. However, Tracy Eichhorn-Hicks has submitted an affidavit stating that Judge Porter said no such thing, and, in fact, it was the prior prosecutors on the case who said that Judge Porter's rulings made it impossible for them to prove their "for the benefit of a gang charges."

Courts approach motions to remove for cause carefully because of the danger that the "appearance of impropriety" can be created simply by the assertion of a party. For this reason it is necessary to look beyond the "he said, she said" of dueling affidavits to the actual record of the proceedings.

There is a transcript of the hearing of March 26, 2007. There is no evidence in that transcript that Judge Porter ever said the case should be dismissed. Judge Porter did say: "You ought to consider whether it's appropriate to go forward or not, that's all I said. I didn't say it ought to be – you should dismiss it." (T14 line 1-4) Mr. Furnstahl himself then states, "Maybe my memory isn't as clear as yours." (T14 line 13) Judge Porter goes on to say in this same transcript that the basis for the discussion about the state going forward was the disputed gang testimony evidence. Judge Porter states: "Well, let me tell you...let me tell you what my concern is here about this case that was the basis for that

discussion, and that is whether it really is in the ...whether you should consider whether it's really in the interest of the State to have this be the test case on the gang issue. I don't – I don't think that I'm asking you or suggesting to you that you dismiss the case on the merits. I don't know whether you can prove the case or not on the merits, but I think you are running a substantial risk that we get one more go-round of appeals and maybe even one more go-round of reversals. Because if your colleagues were correct when we issued the certified question, we really don't know what the rule is on gang testimony. And I don't think – and I suggest that you ought to think about at least to that extent whether this is in the right case to do that in.” (T.14-15)

This context is important in evaluating what Judge Porter meant when he said the state should consider if it's appropriate to go forward. Four of the charges against defendant relate to whether the murder was committed for the benefit of a gang. It is these counts and the testimony necessary to prove these counts that was the basis of most of the pretrial hearings in this case. Judge Porter made rulings on the admissibility of testimony of the State Gang Force experts. These rulings led Mr. Scoggins, the former prosecutor, to state on the record on October 11, 2005, that the rulings precluded the state from proving that these crimes were committed for the benefit of a gang. (T. Oct. 11, 2005, p 188, line 5-10) The certified questions which the appellate courts refused to answer all related to expert gang testimony. When the parties met with Judge Porter on January 16, 2007, to set a trial date, it was the first time that Mr. Furnstahl had appeared on the case, and he was apparently unfamiliar with all that had happened. The statements made by Judge Porter suggesting that Mr. Furnstahl consider whether it was appropriate for the state to go forward relate to the “for the benefit of a gang” counts, express the

same concerns that the former prosecutor had about whether those counts could be proved, and were made after the appellate courts refused to address the certified questions.

Nowhere in this transcript does Judge Porter say the case should be dismissed. He also does not say anything about the principle counts against the defendant, namely that the defendant murdered Tyesha Edwards. What Judge Porter does state is the following: “I represent to you unqualifiedly that I will listen to your case, hold you to your standard of proof, and that I have not prejudged the guilt or innocence of Mr. Burrell.” (T 17-18 lines 25-3)

Given this history, it is troubling that the state is now trying to remove Judge Porter for cause. Judge Porter was simply alluding to the same problems that the previous prosecutor complained about: that the state might have trouble proving those counts relating to the benefit of a gang given the restrictions on expert gang testimony.

There is no Minnesota case specifically addressing the issue of a presiding trial judge discussing the strengths or weaknesses of a portion of a case. However, in Liteky v. United States, 510 U.S. 540, 555-56 (1994) the United States Supreme Court addressed this very issue and established that, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” Indeed, there are several cases where the presiding judge opined on various legal issues and recusal was not warranted. People v. Melka, 319 Ill.App.3d 431 (Ill. App. 2001)(finding insufficient bias or prejudice to disqualify judge where presiding judge

commented on the record regarding merit of defendant's defense); Whitehurst v. Wright, 592 F.2d 834, 838 (5th Cir. 1979)(finding no evidence of bias where trial judge commented on the lack of evidence presented by plaintiff, let alone "pervasive bias")(emphasis in original); see also United States v. Microsoft, 253 F.3d 34 (D.C. App. 2001)(finding the trial judges numerous quotes in the press and in public regarding the merits of the case and his personal views on the character of the parties improper, but, recognizing that the judge's remarks, "may not have given rise to a violation...had he uttered them from the bench.")

Judge Porter has stated absolutely and unequivocally that he has not prejudged the guilt or innocence of Mr. Burrell. Judge Porter will try this case fairly and impartially. Accordingly, under the circumstances cited herein, removal for cause is not warranted.

LAW